Supreme Court, U.S.
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No. 91-2073

In The

Supreme Court of the United States

October Term, 1992

JOHNNIE WALKER,

Petitioner,

vs.

FRITO-LAY, INC.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

SUSAN MCKENNA
GARWOOD & MCKENNA
322 East Pine Street
Orlando, Florida 32801
(407) 841-9496

EDMUND M. KNEISEL
Counsel of Record
JEFFREY A. VAN DETTA
KILPATRICK & CODY
Suite 2800
1100 Peachtree Street
Atlanta, Georgia 30309
(404) 815-6500

Attorneys for Respondent

2333
Lutz Appellate Services, inc.
(800) 3 APPEAL • (800) 5 APPEAL • (800) BRIEF 21

QUESTIONS PRESENTED FOR REVIEW

The questions presented for review by the Court are more appropriately stated as follows:

1. Should the Supreme Court grant certiorari and remand to the court of appeals for an academic discussion of the retroactivity of the Civil Rights Act of 1991 where, as here, a jury has already rejected Petitioner's claims, including his claims for punitive and compensatory damages, and he accordingly has been afforded all the substantive and procedural rights allowed by that statute?

2. Should the Supreme Court grant certiorari to review Petitioner's recusal arguments that were presented in three separate motions in the trial court and rejected as meritless by that court and by the United States Court of Appeals for the Eleventh Circuit?

SUBSIDIARIES AND AFFILIATES OF FRITO-LAY, INC.

The list of subsidiaries of Respondent Frito-Lay, Inc. provided in the Petition in note 1 at pages iii-viii is substantially correct except that the following subsidiaries and affiliates were omitted from that list:

FL Holdings, Inc.

Frito-Lay Holdings Ltd.

General Cinema Beverages Ltd. of California, Inc.

MBA Grand Rapids Co.

Pepsi-Cola Bottling Company of Perry, Inc.

Pepsi-Cola Equipment Corp.

Pepsi-Cola Far East Trade Development Co., Inc.

Pepsi-Cola Interamericana, S.A.

Pepsi-Cola International Ltd.

Pepsi-Cola International Ltd. (U.S.A.)

Pepsi-Cola Mamulleri Ltd. Sirketi

Pepsi-Cola Metropolitan Bottling Company, Inc.

Pepsi-Cola Panamerica, S.A.

Walker's Crisps Holdings Ltd.

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RESPONDENT'S BRIEF IN OPPOSITION

Respondent Frito-Lay, Inc., respectfully requests this Court to deny the Petition for a Writ of Certiorari seeking review of the decision of the United States Court of Appeals for the Eleventh Circuit, which affirmed the judgment of the United States District Court for the Middle District of Florida in favor of Respondent and against Petitioner.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit in this action was not published. A copy of this Opinion is contained in the Appendix to the Petition at pages la-2a, and reference to the Eleventh Circuit's memorandum affirmance appears in the table published at 952 F.2d 410 (11th Cir. 1992). A copy of the jury's unanimous verdict in favor of Respondent in this case, dated September 12, 1990, was not published. A copy of the jury's verdict form is attached hereto as Exhibit "A" of Respondent's Appendix. The district court's findings of fact and conclusions of law based upon the jury's verdict, entered on September 21, 1990, are published at 56 Fair Empl. Prac. Cases (BNA) 971 (M.D. Fla. 1990). A copy of the district court's findings and conclusions is also contained in the Appendix to the Petition at pages 5a-25a. The district court's order entered March 18, 1990, granting a motion to compel Petitioner to order additional portions of the trial transcript for his appeal and denying Petitioner's post-trial motion for judicial reassignment, was not published. A copy of that Order is attached hereto as Exhibit "B" of Respondent's Appendix.

STATEMENT OF THE CASE

Petitioner Johnnie Walker commenced this action against Respondent Frito-Lay, Inc., by filing a complaint on June 19, 1989, alleging violation of the Civil Rights Act of 1866, 42 U.S.C. § 1981 ("Section 1981"), and Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e, *et seq.* ("Title VII"). Claiming that he had been discharged in 1988 because of his black race, Petitioner sought punitive damages and compensatory damages for emotional pain and suffering and demanded trial by jury. Respondent defended this action on the grounds that Petitioner had been terminated for the legitimate, nondiscriminatory reason that he had violated a work

rule prohibiting employees from leaving Respondent's Orlando, Florida plant without clocking out first.

Before trial, Respondent filed a motion to strike Petitioner's jury demand, arguing, *inter alia*, that Section 1981, as interpreted in *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989), did not encompass claims for alleged discriminatory termination of employment. (R1-32).[1] Petitioner vigorously opposed this motion, arguing that a trial by jury was appropriate on his Section 1981 claim and on his claim under Title VII. (R1-36). At the opening of the trial, the trial judge announced that she would reserve ruling on the motion to strike, noting that if the motion were later granted, the jury's verdict would be treated as advisory pursuant to Fed. R. Civ. P. 39(c).[2] The case was tried before a jury on September 6-12, 1990. At the conclusion of the trial, the court submitted the case to the jury on a special verdict form prepared jointly by the parties. (R2-46; R2-49; R2-50).

Petitioner's Title VII and Section 1981 claims involved identical issues of fact on the issue of liability, which was addressed in question 1 of the special verdict form.[3] Questions 2-4 addressed Petitioner's claims for back pay, compensatory damages and

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[1] The designation "R" followed by a series of three numbers refers to the volume number, document number, and page number of the appellate record where support for the immediately preceding statements can be found.

[2] This bench ruling is reproduced in the excerpts of the trial transcript included as Exhibit "C" of Respondent's Appendix. With the exception of this ruling and one jury charge, also included as part of Exhibit "C", Petitioner did not order a transcript of most of the jury proceedings. He did not order a transcript of the charge conference, the court's charge to the jury (with one exception), or all the colloquy between counsel and the court about the jointly prepared form of special verdict.

[3] Question 1 reads as follows: "Do you find from a preponderance of the direct or circumstantial evidence that Defendant discharged Plaintiff Walker intentionally because of his black race?" (Respondent's Appendix, Exhibit "A").

punitive damages. Because the jury returned a verdict for Respondent by answering "no" to the liability question, the jury did not need to answer any of the damages questions. (R2-47; R2-49; R2-50).

After the jury returned its verdict and was excused, the district judge announced that Respondent's motion to strike Petitioner's jury demand would be granted and that she would prepare post-trial findings of fact and conclusions of law that were consistent with the jury's verdict. The post-trial findings of fact and conclusions of law were entered September 21, 1990. The district court ruled in favor of Respondent on the merits of Petitioner's Title VII claim and dismissed the Section 1981 claim under the authority of *Patterson, supra.*

After accurately summarizing the pertinent evidence about the circumstances of plaintiff's discharge, the court made the following factual finding:

> Defendant's managerial employees thoroughly and carefully researched the case before terminating plaintiff. The evidence supports the conclusion of defendant's managerial employees that *Plaintiff willfully, knowingly, and deliberately violated a work rule and then lied to try to conceal his action when he was caught.* His actions constitute falsification of his time card and leaving the work premises prior to clocking out.

(R2-51-9) (emphasis added). In making this determinative credibility finding, the trial judge described numerous inconsistencies (revealed during Petitioner's testimony on cross-examination) between his trial testimony and his previous deposition testimony. (R2-51-3-4, 7, 8). In addition, the court

specifically rejected as a physical impossibility Petitioner's claim that he had clocked out before he left the premises rather than after he returned from his errand.[4] (*See* R5-72-24-26, 29-30, 35-36, 39, 41, 43-45, 80-81, 88; R6-73-104-105, 111-118).

The trial court also rejected Petitioner's pretext claim because there was no evidence of disparate treatment based on race in Respondent's enforcement of the work rule. Petitioner's only evidence of alleged disparate treatment involved Marc Ann Drake, a former employee who had been reprimanded in 1984 for violating the time-clock rule. Ms. Drake, who was called as a witness by Petitioner, testified that she did not know that the Company rules prohibited her leaving the plant for a snack without clocking out.[5] Soon thereafter, all employees were notified about the rule by a posted memorandum and advised that it would be strictly enforced. (R-2-51-5, 14-15).[6]

Mr. Irving Matthews — the plant manager who made the decision to discharge Petitioner — had nothing to do with the handling of the Marc Ann Drake incident because it occurred in 1984, several years before Mr. Matthews came to the plant. (*See* R5-72-39-41; R6-73-122). Mr. Matthews, who is black, testified

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[4] Beginning with the post-termination, internal appeal of his discharge, Petitioner has continuously claimed (untruthfully) that he clocked out before he left the plant. He also claimed that the Company manager who had seen Petitioner in the parking lot before the clock-out time stamped on his time card had lied or was mistaken about the incident. (*See* R2-51-4; R4-71-10; R6-117-117).

[5] Ms. Drake's testimony was so damaging to his case that Petitioner did not even include it in the transcript excerpts ordered for the appeal. Indeed, Petitioner omitted a substantial portion of the trial evidence from the transcript, including his own cross-examination testimony and most of the testimony presented during Respondent's portion of the case.

[6] A copy of this posted memorandum, tendered and admitted at trial as Defendant's Exhibit 3, is reproduced as Exhibit "D" of Respondent's Appendix.

without contradiction that during his tenure as Plant Manager the time-clock rule had been strictly enforced. (R5-72-39-40). The trial court found that after the work rule was "publicly posted" in 1985, all the employees (two blacks, including Petitioner, and three whites) who knowingly violated the rule had been terminated. (R2-51-15 n. 11).

Final judgment was entered in this case on September 21, 1991. (R2-52). Shortly thereafter, Petitioner filed a motion for reconsideration of his pretrial motions for recusal of the trial judge[7] and a motion for a new trial (or "bench trial") on plaintiff's Title VII claim. (R2-53; R2-54; R2-55). The district court denied those motions on October 3, 1990, (R2-53; R2-55), and Petitioner filed a timely notice of appeal on October 19, 1990. (R2-58).

Petitioner did not order the trial transcript until after the Clerk of the Court of Appeals directed him to do so. Even then, Petitioner's transcript order omitted substantial portions of the trial testimony and most of the rulings by the trial judge pertinent to the jury trial issues. *See* notes 2 and 5, *supra*. As a result, pursuant to Fed. R. App. p. 10(b)(3), Respondent filed a motion to compel Petitioner to order additional portions of the trial transcript necessary to a full review of the case on appeal. (R7-76). The trial court granted this motion,[8] but Petitioner never ordered a complete

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[7] In Petitioner's initial complaint and again by separate motion and affidavit filed September 28, 1989, Petitioner sought recusal of Hon. Patricia C. Fawsett (as well as Hon. Kendall G. Sharp, the other district judge resident in Orlando) for alleged bias against Petitioner's attorney and against the Committee of Organized Groups ("COG"), of which Petitioner claimed to be a member. (R1-1-11; R1-6-1; R1-7-1). The district court denied the pretrial recusal motion as "insufficient as a matter of law." (R1-6-1).

[8] In the same order, the district court also denied Petitioner's third motion for recusal, styled as motion for "judicial reassignment." (R7-76). This order is reproduced in Respondent's Appendix as Exhibit "B".

transcript.[9] Instead, he filed a notice of supplemental appeal. (R7-79).

In his brief to the Eleventh Circuit, Petitioner challenged the trial court's factual findings, credibility findings, various evidentiary rulings, and denial of his recusal motions. The fragmentary, incomplete trial transcript ordered by Petitioner did not support his arguments or contradict any of the district court's factual findings or evidentiary rulings. Petitioner also failed to support his recusal arguments by identifying any factual basis for questioning the district judge's impartiality. The appellate record does not contain the slightest hint of bias, prejudice, or partiality by the judge against Petitioner or his counsel. On February 28, 1992, the Eleventh Circuit affirmed the judgment and orders of the district court.

SUMMARY OF THE ARGUMENT

Petitioner's claims for discriminatory discharge under Section 1981 and Title VII have already been tried to a jury. The jury rejected Petitioner's claims by answering question 1 on the special verdict form in the negative. Petitioner has already received every procedural entitlement incorporated in the jury trial and damages amendments to Title VII and Section 1981 enacted as part of the Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (Nov. 21, 1991) ("the 1991 Act"). Thus, even if this Court held that the

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[9] Because the trial transcript omits substantial portions of the trial proceedings, the appeal could have been dismissed on that ground. *E.g., Thomas v. Computax Corp.*, 631 F.2d 139, 141 (9th Cir. 1980); *Battrud v. Town of Exline*, 628 F.2d 1098, 1099 (8th Cir. 1980); *see* Fed. R. App. P. 3(a). In any event, in the absence of a complete transcript, no error may be predicated on the court's rulings or findings. *See, e.g., Green v. Aetna Ins. Co.*, 397 F.2d 614, 618-19 (5th Cir. 1968); *Fischer v. Dallas Fed. Sav. and Loan Ass'n*, 835 F.2d 567, 568 (5th Cir. 1988); *Ewers v. Board of County Comm'rs*, 802 F.2d 1242, 1250 (10th Cir. 1986), *cert. denied*, 484 U.S. 1008 (1987).

1991 Act were fully retroactive and applied to claims arising more than two years before its passage, the result in this case would be to remand for entry of final judgment for Respondent in accordance with the jury's verdict.

Similarly, Petitioner's recusal claim has already been rejected as meritless by four federal judges (including the trial judge) and should not be reviewed by this Court. Petitioner has failed to identify any factual basis whatsoever for questioning the trial judge's impartiality, and there is not the slightest hint of bias, prejudice, or partiality in the appellate record.

Accordingly, neither the issue of the 1991 Act's retroactivity nor the issue of recusal warrants review on certiorari in this case.

REASONS FOR DENYING THE PETITION

I.

THIS CASE SHOULD NOT BE REMANDED TO CONSIDER THE RETROACTIVITY OF THE CIVIL RIGHTS ACT OF 1991 BECAUSE A RULING ON THAT ISSUE COULD NOT AFFECT THE OUTCOME OF THE CASE.

Petitioner contends that this case should be remanded to the Eleventh Circuit for consideration of the issue of retroactivity of the Civil Rights Act of 1991. There is no basis whatsoever for such a remand because Petitioner's claims, including his claims for compensatory and punitive damages, have already been rejected by a jury. Petitioner would not be entitled to a new jury trial under the 1991 Act even if it were fully retroactive.

In essence, Petitioner argues that because the trial judge entered post-trial findings of fact and conclusions of law that treated the jury's verdict for Respondent as "advisory" rather than binding, the case must be remanded for a new jury trial. Before trial, Respondent had moved to strike Petitioner's jury demand, but the trial court deferred ruling on this motion and the case was fully tried to a jury. Neither the jury nor counsel for the parties were told that the jury would be advisory. *See* note 11, *infra*. After being appropriately instructed on applicable legal principles, the jury returned a verdict by finding specifically that Respondent had not engaged in intentional racial discrimination. *See* note 3 and accompanying text, *supra*.

Petitioner's meritless claims have already been rejected by one jury, and he is not entitled to present those same claims to another jury. Under the well-established harmless error rule, the Court disregards any error or defect which does not affect the substantial rights of the parties. *McDonough Power Equip., Inc. v. Greenwood*, 464 U.S. 548, 553-54 (1984); 28 U.S.C. § 2111 (1988). Thus, even "if there was any error in treating the jury's verdict as advisory and concurring therein, such error would be harmless" because Petitioner's claims were fully tried to the jury as if it were a jury of right. *Pennsylvania Thresherman & Farmers' Mut. Casualty Ins. Co. v. Crapet*, 199 F.2d 850, 853 (5th Cir. 1952) (no error where court decided to treat jury's verdict as advisory after verdict had been returned); *see also First Nat'l Bank v. National Airlines, Inc.*, 288 F.2d 621, 623 (2d Cir.) (no prejudice to party contending that it was denied right to jury determination of issue when issue submitted to advisory jury), *cert. denied*, 368 U.S. 859 (1961); 28 U.S.C. § 2111 (1988).

No purpose could be served by remanding this case for a determination of whether the 1991 Act should be applied retroactively because the results of that determination would not

alter the substantive outcome of the case.[10] For example, in situations in which a jury's verdict is not conclusive, but the trial court enters a final judgment without issuing separate findings of fact and conclusions of law as required by Fed. R. Civ. P. 52, the remedy is not to remand the case for a new trial. Instead, the issuance of post-judgment findings and conclusions is permitted to avoid any necessity for remand and a second appeal. *Evans v. Lockheed-Georgia Co.*, 33 Empl. Prac. Dec. (CCH) ¶34,009 (N.D. Ga.) (to prevent piecemeal appeal, court may enter findings of fact and conclusions of law pursuant to Rules 52 and 39(c) of Fed. R. Civ. P. after entry of judgment on jury's verdict), *aff'd mem.*, 721 F.2d 821 (11th Cir. 1983), *cert. denied*, 469 U.S. 980 (1984); *see Gibbs v. Buck*, 307 U.S. 66 (1939); *Johnson v. Heyd*, 415 F.2d 1005 (5th Cir. 1969); *Reinstine v. Rosenfield*, 111 F.2d 892 (7th Cir. 1940). Likewise, if the trial court here erred in its post-verdict legal rulings, any such error has only technical, rather than substantive, effect. The only remedial action that could conceivably be required is for the trial court to enter final judgment on the jury's verdict for Respondent. There is no basis for the court of appeals to reconsider the merits of the jury trial.[11]

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[10] The same proposition applies to Petitioner's meritless argument that the ruling in *Patterson*, *supra*, should *not* be retroactively applied. Indeed, in its findings and conclusions, the court noted that it was precisely because of the unsettled state of the law after *Patterson* that it submitted Petitioner's § 1981 claim to the jury. The court noted that this approach would "avoid the necessity for a new trial should this Court's legal ruling [dismissing the § 1981 claim] be reversed on appeal." (*See* Petitioner's Appendix, p. 21a).

[11] Petitioner vigorously opposed Respondent's motion to strike Petitioner's jury demand and did not object when the district court reserved ruling on that motion and announced that the case would be tried to a jury, whose verdict *might be* treated as advisory if the court later decided to grant the motion. *See* Respondent's Appendix, Exhibit "C". As a result, Petitioner has clearly waived any right to complain of the adverse jury verdict. *See generally, Stockton v. Altman*, 432 F.2d 946, 949-50 (5th Cir. 1970) (jury verdict treated as binding against party who did not object to jury at trial but contended on appeal that issues tried were equitable in nature and jury's verdict should be advisory), *cert. denied*, 401 U.S. 994 (1971); *Kelly v. Shamrock Oil & Gas Co.*, 171 F.2d 909, 911 (5th Cir. 1948) (party who demanded jury trial could not contend on appeal that case should not have been tried to jury), *cert. denied*, 337 U.S. 917 (1949); Fed. R. Civ. P. 39(c).

For the foregoing reasons, none of the recent cases that this Court has remanded for consideration of the retroactivity of the 1991 Act supports a remand here. For example, in *Holland v. First Virginia Banks, Inc.*, 744 F. Supp. 722, 723 n. 1 (E.D. Va. 1990), the plaintiff's Section 1981 claim for racially discriminatory discharge was tried to a jury, which returned a verdict in the plaintiff's favor. The Fourth Circuit reversed, apparently on the ground that *Patterson* barred such claims. 937 F.2d 603 (4th Cir. 1991). Obviously, if the 1991 Act applies retroactively to the claims in *Holland*, the jury's verdict in favor of the plaintiff should be reinstated. Accordingly, this Court granted certiorari, vacated the judgment, and remanded the case to the Fourth Circuit for a ruling on the outcome-determinative retroactivity issue. ____ U.S. ____, 112 S. Ct. 1152 (1992).

In *Hicks v. Brown Group, Inc.*, 946 F.2d 1334 (8th Cir. 1991), the Eighth Circuit reversed a jury verdict for the plaintiff on his Section 1981 discriminatory discharge claim. *See* 902 F.2d 630, 634-35 (8th Cir. 1990), *vacated and remanded*, ___ U.S. ___, 111 S. Ct. 1299 (1991). This Court remanded the case for further consideration in light of the 1991 Act. ____U.S. ____, 112 S. Ct. 1255 (1992). Once again, a ruling on the retroactivity issue would be outcome determinative. In contrast to *Hicks* and *Holland* the jury in this case returned a verdict for Respondent; therefore, a remand for consideration of the retroactivity issue would be pointless.[12]

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[12] Every Court of Appeals that has ruled on the issue has held that the 1991 Act is not retroactive. *E.g., Fray v. Omaha World Herald*, 960 F.2d 1370 (8th Cir. 1992); *Vogel v. Cincinnati*, 959 F.2d 594 (6th Cir. 1992); *Mozee v. American Commercial Marine Serv. Co.*, 58 Fair Empl. Prac. Cases (BNA) 1201 (7th Cir. May 7, 1992). Among the many district courts that have considered the issue, "[t]here is great confusion as to whether [the Act] is retroactive." *Ekandem v. District of Columbia*, 58 Empl. Prac. Dec. (CCH) ¶41,413, at 70,510 (D.D.C. Apr. 10, 1992). At least one district court has resolved this confusion by convening an advisory jury to try a Title VII claim in a case filed before the effective date of the Act. *Id.*

Similarly, Petitioner's reliance upon *Gersman v. Group Health Ass'n, Inc.*, 931 F.2d 1565 (D.C. Cir. 1991), *cert. granted, vacated, and remanded*, ____ U.S. ____, 112 S. Ct. 960 (1992), is misplaced. The plaintiff's claim in that case was dismissed pursuant to Fed. R. Civ. P. 12(b)(6). Obviously, *Gersman* does not support the remand of a case for a new jury trial when the plaintiff has already had a jury reject his claim on the merits.

This Court has recently stated that "[a] principal purpose for which [it] use[s] . . . certiorari jurisdiction . . . is to resolve conflicts among the Circuit Courts of Appeals and state courts concerning the meaning of provisions of federal law." *Braxton v. United States*, ____ U.S. ____, 111 S. Ct. 1854, 1857 (1991); *see* Sup. Ct. R. 10.1. This Court does not employ certiorari jurisdiction to issue advisory opinions that are not determinative of the outcome of the case. Because a ruling on the retroactivity of the 1991 Acts would not affect the outcome of the appeal, the Petition should be denied.

II.

PETITIONER'S MERITLESS RECUSAL CONTENTIONS DO NOT PROVIDE A BASIS FOR ISSUANCE OF A WRIT OF CERTIORARI IN THIS CASE.

Petitioner also argues that this Court should review the rulings denying his motions for recusal of "federal judges resident in Orlando." Petitioner's meritless recusal arguments have already been rejected by the trial judge and three circuit judges because Petitioner has never shown the existence of the slightest hint of personal bias, prejudice, or partiality against him by the trial judge. Petitioner's meritless contentions are obviously not an appropriate issue on which to grant certiorari.[13]

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[13] For example, although Petitioner points to the fact that the trial judge recused herself in a previous case involving his trial counsel and "COG," of which he is a member, it is well established that a judge's voluntary recusal in a prior case does not require recusal in a subsequent case, even involving the same party. *E.g., United States*

(Cont'd)

Petitioner argues at length that the trial judge's bias is evidenced by her evidentiary rulings about Petitioner's state-law claim for unemployment benefits. It is well established, however, that "adverse rulings or mere error [by the trial judge] . . . is an insufficient basis for recusal." *United States v. IBM Corp.*, 539 F. Supp. 473, 478-79 (S.D.N.Y. 1982); *United States v. Schwartz*, 535 F.2d 160, 165 (2d Cir. 1976), *cert. denied*, 430 U.S. 906 (1977).

In any event, no bias could possibly be inferred from those rulings because the appellate record does not show any error regarding the unemployment compensation appeals proceedings. For example, the record does not show exclusion of a transcript of a tape-recorded unemployment compensation appeals hearing "for any and all purposes," as Petitioner misleadingly states. (Petition, p. 20). When counsel for Petitioner initially tendered the transcript, he failed to present any foundation for its admission. The trial judge explained that he might be able to bring up the unemployment compensation appeal at a later stage in the case and that "[i]t may be more relevant then, but just on the record at this point, I do not feel that [the transcript] should come in on this record." (R4-71-40). Counsel never attempted to tender the unemployment

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(Cont'd)

v. Merkt, 794 F.2d 950, 960 (5th Cir. 1986), *cert. denied*, 480 U.S. 946 (1987). Likewise, Petitioner's (unsupported) allegations of alleged animosity towards his trial counsel are irrelevant. *E.g., Davis v. Board of School Comm'rs*, 517 F.2d 1044, 1050 (5th Cir. 1975), *cert. denied*, 425 U.S. 944 (1976). The record is utterly devoid of evidence of any such animosity. Further, Petitioner's allegations concerning rumors his trial counsel heard about the trial judge's animosity towards civil rights plaintiffs is simply irrelevant to the existence of bias against Petitioner personally and thus provide no basis for recusal. *See Phillips v. Joint Legislative Comm.*, 637 F.2d 1014, 1020 (5th Cir. 1981), *cert. denied*, 456 U.S. 960 (1982); *Vietnamese Fishermens Ass'n v. Knights of the Ku Klux Klan*, 518 F. Supp. 1017, 1019-20 (S.D. Tex. 1981). Petitioner's reliance on *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847 (1988), is misplaced because the Court there merely held that recusal was warranted where the trial judge was also a trustee of a university that had a direct financial interest in the outcome of the trial.

compensation appeal transcript again, and he did not call any witness who could authenticate that transcript or who could be impeached by its contents. *See, e.g., United States v. Biggins*, 551 F.2d 64, 66 (5th Cir. 1977) (authentication of tape recordings required as prerequisite to admissibility).

Similarly, the trial court did not display any bias in excluding the unemployment compensation award from evidence. The only issue considered in that award was whether Petitioner was barred from receiving unemployment compensation benefits under Florida law because he had been discharged for misconduct constituting "willful or wanton disregard" of his employer's interests, *see* Fla. Stat. Ann. § 443.001, *et seq.* (West 1981). (Petitioner's Appendix, pp. 42a-43a). The appeals referee did not make any finding on the issue of whether or not Petitioner had clocked out before leaving the plant premises. Instead, the referee ruled that any violation of the time-clock rule was "an isolated incident of misconduct [that] does not serve to disqualify [Petitioner] from receiving unemployment compensation benefits." (*Id.* at 43a).

Unemployment compensation awards should be admitted into evidence only when the award contains a factual finding of misconduct "clearly relevant to a charge that an employee has been fired not for any proper reason but because of racial discrimination." *Barfield v. Orange County*, 911 F.2d 644, 650-51 n.7 (11th Cir. 1990), *cert. denied*, ___ U.S. ___, 111 S. Ct. 2263 (1991). Where, as here, an administrative award does not contain any such finding, it is properly excluded. *Id.* at 650 (decision to admit or exclude administrative reports should be left to "the sound discretion of the district court"); *see, e.g., Mitchell v. Bendix Corp.*, 603 F. Supp. 920, 921-22 (N.D. Ind. 1985) (granting motion to strike allegations regarding outcome of unemployment compensation proceedings as irrelevant in Title VII action); *see also McAlester v. United Air Lines, Inc.*, 851 F.2d 1249, 1259 (10th

Cir. 1988) (affirming district court's exclusion of arbitrator's written opinion as misleading and prejudicial in Title VII action because it did not address issue of discrimination); *Pollard v. Rea Wire Magnet Co.*, 824 F.2d 557 (7th Cir. 1987), *rev'g* 674 F. Supp. 645, 652-54 (N.D. Ind. 1986) (reversing district court's finding of pretext in Title VII action where court had relied, in part, on unemployment compensation ruling), *cert. denied*, 484 U.S. 977 (1987). Accordingly, Petitioner's meritless, unsupported recusal arguments, like his wholly abstract arguments about the retroactivity question, do not present any issue appropriate for review on certiorari.

CONCLUSION

For all of the foregoing reasons, Respondent respectfully submits that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

EDMUND M. KNEISEL
Counsel of Record
JEFFREY A. VAN DETTA
KILPATRICK & CODY
Suite 2800
1100 Peachtree Street
Atlanta, Georgia 30309
(404) 815-6500

SUSAN K. MCKENNA
GARWOOD & McKENNA, P.A.
322 East Pine Street
Orlando, Florida 32801
(407) 841-9496

Attorneys for Respondent

APPENDIX

EXHIBIT A — SPECIAL VERDICT FORM

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

Case No. 89-522-CIV-ORL-19

JOHNNIE WALKER,

Plaintiff,

v.

FRITO-LAY, INC.,

Defendant.

VERDICT

I. ON THE ISSUE OF LIABILITY

1. Relating to Racial Discrimination Against Plaintiff Walker.

Do you find from a preponderance of the direct or circumstantial evidence that Defendant discharged Plaintiff Walker intentionally because of his black race?

Yes _____ No ___X___

If you answer "No" to this Question, please skip to Part III and answer Question 6. If you answer "Yes" to this question, then you should also answer the remaining questions on damages under Part II below and Question 6 under Part III.

II. ON THE ISSUE OF DAMAGES

2. Relating to Plaintiff Walker's Compensatory Damages

(a) Do you find from a preponderance of the evidence that Plaintiff Walker is entitled to recover compensatory damages for lost wages and other job-related benefits?

Yes _____ No _____

(b) If you answer "Yes," then state the amount of Plaintiff Walker's compensatory damages: $_____.

3. Relating to damages for Emotional Pain and Suffering

(a) Do you find from a preponderance of the evidence that Plaintiff Walker is entitled to recover monetary damages for emotional pain and suffering?

Yes _____ No _____

(b) If you answer "Yes," then state the amount of Plaintiff Walker's damages for emotional pain and suffering:

$_____

4. Relating to Plaintiff Walker's Punitive Damages

(a) Do you find from a preponderance of the evidence that Plaintiff Walker is entitled to recover punitive damages?

Yes _____ No _____

(b) If you answered "Yes," then state the amount of Plaintiff Walker's punitive damages: $_____

5. Relating to Plaintiff Walker's Duty to Mitigate or Reduce His Damages:

(a) Do you find from a preponderance of the evidence that Plaintiff Walker exercised reasonable diligence to mitigate or reduce his alleged compensatory damages by seeking, obtaining, and retaining other, comparable employment after the end of his employment with Frito-Lay, Inc.?

Yes _____ No _____

(b) If you answer "No," then state the amount by which Plaintiff Walker's compensatory damages should be reduced:

$_____

III. ON THE ISSUE OF DEFENDANT'S COUNTERCLAIM

6. Do you find from a preponderance of the evidence that the Defendant is entitled to recover from the Plaintiff the amount of $303.40 for vacation pay?

Yes _____ No __X__

We, the Jury, are unanimous in answering the above Questions based on a preponderance of the evidence, and hereby return our verdict accordingly.

SO SAY WE ALL.

Dated this 12th day of September, 1990.

/s/ L.G. Carlson
Foreperson

EXHIBIT B — ORDER ENTERED MARCH 18, 1991

UNITED STATES DISTRICT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

Case No. 89-522-CIV-ORL-19

JOHNNIE WALKER,

Plaintiff,

v.

FRITO-LAY, INC.,

Defendant.

ORDER

This cause was considered upon the following matters:

1. Plaintiff's Motion to Set Aside Taxing of Costs by the Clerk and Memorandum in Support thereof (Doc. Nos. 61 and 62, filed October 30, 1990) and Defendant's Brief in Opposition to Plaintiff's Motion to Set Aside Taxing of Costs by the Clerk (Doc. No. 63, filed November 13, 1990).

Plaintiff's Motion to Set Aside Taxing of Costs by the Clerk (Doc. No. 61) is DENIED.

2. Defendant's Motion to Compel Plaintiff to Order

Additional Portions of Trial Transcript and Brief in Support thereof (Doc. Nos. 66 and 67, filed January 7, 1991) and Plaintiff's Memorandum in Opposition to Motion to Compel Plaintiff to Order Additional Portions of Trial Transcript (Doc. No. 68, filed January 24, 1991).

Rule 10(b)(3) of the Federal Rules of Appellate Procedure provides that if the appellant orders only a partial transcript, he is required to provide the appellee with a statement of the issues to be presented on appeal. The appellee may then designate additional portions of the record to be included in the record on appeal. If the appellant does not order these additional parts of the transcript, the appellee may either order the parts or move the district court for an order requiring the appellant to order them.

In the instant case, Plaintiff, the appellant, ordered a partial transcript but failed to provide Defendant with a statement of the issues presented on appeal. Nevertheless, Defendant did its best to determine the issues on appeal by reviewing the parts of the transcript ordered by Plaintiff and Plaintiff's Motion for New Trial. Defendant then served on Plaintiff a "Designation of Additional Portions of Trial Transcript For Plaintiff-Appellant to Order" (Doc. No. 64). Plaintiff has not ordered these portions of the transcript nor otherwise responded to Defendant's designation. Defendant moves this Court to compel Plaintiff to order the additional parts of the transcript.

Plaintiff fails to cite any authority that supports its position that the Defendant should bear the costs of the portions of the transcript it designates as necessary to consideration on appeal. Plaintiff's reliance on *Mandel v. Max-France, Inc.*, 704 F.2d 1205 (11th Cir. 1983), is misplaced. In *Mandel*, the court merely reiterated the appellee's responsibility for designating any parts of the record necessary for review on appeal but not initially ordered by the appellant. *Id.* at 1206-07. Plaintiff attempts to construe the court's

admonition that the appellee shares in the burden of ensuring the adequacy of the record on appeal to mean that the appellee must pay for the parts it designates as necessary. The *Mandel* case does not support this contention.

Plaintiff further contends that Defendant does not really need many of the parts of the transcript it included in its designation. Plaintiff contends that Defendant merely seeks to burden Plaintiff with additional costs. In making these accusations, Plaintiff misrepresents the items included in the Defendant's designation. For example, Plaintiff suggests that Defendant seeks the transcript of "the entire voir dire." Defendant, however, only designated the voir dire of two prospective jurors. A review of Defendant's designation indicates that Defendant has carefully limited the items to those which relate to issues likely to be presented on appeal. There is no indication that any items were included in bad faith or in an attempt to financially burden the Plaintiff. In light of the fact that Plaintiff failed to provide a statement of the issues to be presented on appeal as required under Rule 10(b)(3), Plaintiff is fortunate to be responsible for anything less than a complete transcript.

For the foregoing reasons, the Court GRANTS Defendant's Motion to Compel Plaintiff to Order Additional Portions of Trial Transcript (Doc. No. 66). Plaintiff is instructed to order the parts of the transcript designated by Defendant in its Designation of Additional Portions of Trial Transcript for Plaintiff-Appellant to Order (Doc. No. 64).

3. Plaintiff's Motion for Judicial Reassignment and Memorandum in Support thereof (Doc. Nos. 69 and 70, filed January 24, 1991) and Defendant's Brief in Opposition to Motion for Judicial Reassignment (Doc. No. 74, filed February 5, 1991).

Plaintiff's Motion for Judicial Reassignment (Doc. No. 69) is DENIED.

DONE AND ORDERED at Orlando, Florida, this 5th day of March, 1991.

/s/ Patricia C. Fawsett

PATRICIA C. FAWSETT
UNITED STATES DISTRICT JUDGE

Copies to:
All Counsel of Record.

EXHIBIT C — EXCERPTS FROM TRIAL TRANSCRIPT

(Transcript of September 6, 1990, pp. 3-4)

THE COURT: The Plaintiff has asserted claims under Title 7 of the Civil Rights Act, United States Code Section 2,000-E and 42 United States Code Section 1981. I agree that in this circuit there is no right to a jury trial for Plaintiff under Title 7 and while there is a right to a jury trial on the issues in the Section 1981 claim, it appears that the 1981 claim here may fail in light of the recent decision of the Supreme Court in Patterson versus McGleen.

However, the Supreme Court did not directly state that a claim of discriminatory discharge would fall outside the scope of Section 1981, while the 5th, 6th and 9th Circuits, as well as Federal District Court's have so held. The 8th Circuit opinion is acknowledged by this Court and it agrees with this view and has held that a racially discriminatory discharge continues to be actionable under 1981.

The 11th Circuit has not addressed the precise question, although it has held that Section 1981 does not provide remedy for an employee who is injured by his former employer's efforts to persuade his new employer to fire him in retaliation for the employee's filing an EEOC complaint against the former employer, in the decision at 91 Federal 2nd 1527, and although the Defendant was not accused of discriminatory discharge, the 11th Circuit recognized in Patterson or in that case, that the Patterson decision is significantly narrow to reach Section 1981 in the context of employment discrimination suits and interpreted Patterson as holding that suits based on post-contractual events cannot be brought under Section 1981.

It is, therefore, likely that the 11th Circuit will adopt the view that, in light of Patterson, a discriminatory discharge claim is not actionable under Section 1981, at least where there is no reasonable

way to construe the discharge as a repeal to entering into a new contract with the Plaintiff, which appears to be the situation that's alleged in this case.

However, it appears to me that since the jury has been called, since this motion was not filed until August 20, 1990, after this case had long been noticed for trial, that the Court should reserve ruling on the motion.

(WHEREUPON, the excerpt was concluded.)

*****

(Transcript of September 6, 1990, pp. 5-6)

THE COURT: All right, does the Plaintiff have any challenges for cause or just state the names of anyone.

MR. KAIMOWITZ: No, I have none.

THE COURT: Does the Defendant?

MR. KNEISEL: Yes, ma'am. Mr. Johnson is the gentleman in the case—

MR. KAIMOWITZ: I'm sorry?

MR. KNEISEL: Mr. Johnson is the gentleman in the case—

THE COURT: Are you going to object? I realize that is supposition. Can he be a silent juror?

MR. KAIMOWITZ: I'm trying like heck, unnecessarily, to avoid an all white jury because—

avoid an all white jury because—

THE COURT: But observing his demeanor, I don't think there's any way he could be fair and objective in this case. I'll grant the challenge for cause as to Mr. Johnson. That's number 88, Edward Johnson.

* * * * *

THE COURT: The Plaintiff challenges juror 30, Joseph Chmelir. Into his seat will go juror 191, Harold D. Wray. Does the Defendant wish to exercise a challenge?

MR. KNEISEL: Yes, ma'am. Mr. Graham, number 66.

THE COURT: All right. Juror number 66—

MR. KAIMOWITZ: I'm sorry, which is that?

THE COURT: Joe A. Graham, juror number 66.

MR. KAIMOWITZ: I'm going to make an objection to preserve the record, that blacks have been excluded from the jury—

THE COURT: Mr. Kneisel, you need to state your grounds.

MR. KNEISEL: Yes, ma'am. The fact that her sister had sued Frito-Lay. I can assure you the fact that she's black is not a factor. She did exercise some supervisory authority in the present position and has terminated employees, but the fact that the sister previously sued Frito-Lay arising out of a dispute and the fact that the Plaintiff has several witnesses on his list, including several who have filed worker's compensation cases and have been involved in similar accidents in Frito-Lay have, perhaps, subconsciously

THE COURT: All right. I'll allow the Defendant to exercise the challenge. Number 66, Joe A. Graham, will be the peremptory challenge and into his seat will go 186. Marilyn Whiddon.

* * * * *

EXCERPT FROM JURY INSTRUCTIONS

(Transcript of September 12, 1990, p. 2)

Defendant denies that it discharged plaintiff because of his race. Defendant contends that the plaintiff was discharged because he violated work rules that prohibit employees from leaving the plant premises without first clocking out and falsification of a time card.

The burden of proving that the decision was racially discriminatory remains upon plaintiff throughout the case. The defendant does not have to prove that the employment decision in issue was not racially biased.

In addition, when the defendant offers evidence to show that its termination decision was based upon a reasonable non-discriminatory factor or factors, the plaintiff has the burden of negating such evidence by proving that such factor or factors was a mere pretext or false excuse for illegal race discrimination.

* * * * *

EXHIBIT D — POSTED MEMORANDUM (DEFENDANT'S TRIAL EXHIBIT 3)

FRITO-LAY, INC.

TO: All Employees

FROM: Al Carballosa

DATE: March 11, 1985

SUBJECT: Leaving the Plant While "On The Clock"

In keeping with our promise to clarify policies for our new and long-service employees, the following will be another in a series of policy clarifications.

Even though it may, at times, seem easy to go out to lunch; or go out of the Plant and forget to punch out, keep in mind that this is a very serious Plant rule violation, and could lead to disciplinary action up to and including termination. Our Handbook Section28 states:

> "The following actions are prohibited and may result in disciplinary action up to and including discharge depending on the severity.
>
> - Leaving the plant or work station during working hours without permission, and clocking out."

Any employee who does leave the Plant while on the clock may be seen as having abandoned their job, and in this situation, termination may be real consequence.

Please see your supervisor if you have any questions.

Al Carballosa

AC/sg